

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

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7 BEECHWOOD RESTORATIVE CARE) 02-CV-6235(L)
CENTER, BROOK CHAMBERY AND)
8 OLIVE CHAMBERY,)
Plaintiffs)
9 vs.) Rochester, New York
10 LAURA E. LEEDS, EDMUND RUSSELL) June 20, 2012
ALTONE, SANFORD RUBIN,) 1:10 p.m.
11 SUSAN T. BAKER, SHARON A. CARLO,)
CYNTHIA T. FRANCIS and ELIZABETH)
12 RICH,)
Defendants.)
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

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24 COURT REPORTER: Christi A. Macri, FAPR, RMR, CRR, CRI
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I N D E X

WITNESS FOR
THE PLAINTIFF

DX CX RDX RCX

Russell Altone

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EXHIBIT RECEIVED

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PROCEDINGS

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(WHEREUPON, the jury is present; the direct examination of Russell Altone was previously reported, but not transcribed).

01:09PM 5 CROSS-EXAMINATION

6 | BY MR. LEVINE:

7 Q. Whereabouts do you live?

8 A. In the Albany area.

Q. And let's describe for the jury your educational background.

01:10PM 10 | You have a bachelor's degree?

11 A. I do.

12 Q. From?

13 A. Bachelor of Arts from the University of Buffalo.

14 Q. What year?

01:10PM 15 A. In 1968.

16 Q. And from there did you go to law school?

17 A. To the John Marshall Law School in Chicago, graduated in
18 1976.

19 Q. Do you have any other degrees?

01:10PM 20 A. Yes, I do. A master of arts in history from the University
at Albany 1980; and then in 2011, after I retired from the
New York State Department of Health, I completed a master's in
public health.

24 Q. Where did you get that master's?

01:10PM 25 A. University at Albany School of Public Health.

1 Q. Now, you were admitted to practice law starting in 1977?

2 A. That's correct.

3 Q. Are you currently licensed to practice law in New York State?

4 A. Yes, I am.

01:10PM 5 Q. You're a member in good standing?

6 A. Yes, I am.

7 Q. Have you ever had any attack to your license in any form?

8 A. None whatsoever.

9 Q. Now, what are you currently doing? You said you retired in
01:11PM 10 2010. What are you doing since then?

11 A. Well, I completed the master's in public health. And I teach
12 a course in Public Health Law to master's and doctoral students at
13 the University at Albany School of Public Health.

14 Most of my time is spent in community public health and
01:11PM 15 pro bono legal work involving refugees who are being resettled in
16 the Albany area. I volunteer with my wife, and I volunteer with
17 the U.S. Committee For Refugees and Immigrants.

18 Q. Pro bono means?

19 A. For free.

20 Q. You were an attorney with the Department of Health from 1977
01:11PM 21 to 2010?

22 A. Except for 1979 through 1982 when I was with the Office of
23 Counsel, Legal Department of the former Department of Social
24 Services.

25 Q. Which is another -- a different state agency?

1 A. It was.

2 Q. It was. And now?

3 A. It no longer exists.

4 Q. Because it's part of the DOH?

01:12PM 5 A. Yes.

6 Q. Now, you talked about your supervisory role with the BAH,
7 correct?

8 A. Yes.

9 Q. And what is -- BAH stands for?

01:12PM 10 A. The Bureau of Administrative Hearings.

11 Q. So the attorneys that you supervised, is the sole forum that
12 they appear in is administrative hearings?

13 A. That's correct.

14 Q. So if there was an action in a federal court, they wouldn't
01:12PM 15 go there?

16 A. They would not.

17 Q. If there was an action in state court, they wouldn't go
18 there?

19 A. No, they would not. The Attorney General probably would.

01:12PM 20 Q. And what type of issues did your staff work on? I'm just
21 looking for the broadest categories.

22 A. About 30 different ones.

23 Q. Just name a few big ones.

24 A. Nursing home operators, hospital operators, managed care,
01:13PM 25 funeral directing, clinical laboratories.

1 Q. Okay.

2 A. Nutrition program. Many others.

3 Q. Each of these issues, if there were problems, they're brought
4 before an administrative hearing; is that correct?

01:13PM 5 A. Most of the time we attempt in every way possible to settle
6 these, but when we could not, we would bring them to hearings
7 before administrative law judges.

8 Q. What is an administrative law judge?

9 A. An administrative law judge is an attorney specially trained
01:13PM 10 in the law. They receive special continuing legal education --

11 MR. ROTHENBERG: Objection. I'm not sure this is fact
12 testimony, Your Honor. It sounds to me like it's either the
13 Court's prerogative or expert testimony.

14 MR. LEVINE: It's the area of expertise that he works in,
01:13PM 15 the Administrative Bureau. It explains who they bring their cases
16 in front of.

17 THE COURT: I will allow him to testify. The Court may
18 give an instruction on this or may not.

19 MR. LEVINE: Thank you, Judge.

01:14PM 20 BY MR. LEVINE:

21 Q. I forgot where you were, so if you can just explain what are
22 administrative law judges?

23 A. Administrative law judges are impartial triers of fact. They
24 are -- they are bound to be impartial, and they hear cases, due
01:14PM 25 process cases, in which the Department presents its case.

1 Department prosecutors, such as myself and the attorneys
2 I work with, present cases to those administrative law judges; and
3 respondents, such as nursing home operators and others, are given
4 full due process opportunity to present their cases in trial

01:14PM 5 type --

6 THE COURT: That's a little broader definition of an
7 administrative law judge, so I'll strike that.

8 MR. LEVINE: Yes, sir.

9 MR. ROTHENBERG: Thank you, Your Honor.

01:14PM 10 BY MR. LEVINE:

11 Q. Let's try to stick with the question and the answer.

12 A. All right.

13 Q. With regards to who you reported to, you reported to Hank
14 Greenberg?

01:15PM 15 A. Yes.

16 Q. And I think you said about 25 attorneys reporting to you?

17 A. The numbers varied during the period in question, but I think
18 it was 17 to 21, perhaps more.

19 Q. But all of those attorneys that you supervised, their role
01:15PM 20 was as prosecutors?

21 A. Yes.

22 Q. Now, if you estimated how many -- what percentage of the
23 cases actually settled of the cases that were prosecuted?

24 A. More than 90%.

01:15PM 25 Q. And generally your role as an attorney for the Department of

1 Health, who were your clients?

2 A. Various programs within the New York State Department of
3 Health.

4 Q. And what about the employees of the Department of Health?

01:16PM 5 A. I never regarded our role as being personal attorneys for any
6 employee. It was for the Commissioner of Health and the
7 Department of -- Department programs.

8 Q. So what was -- as a DOH attorney, what was your job broadly
9 as an attorney?

01:16PM 10 A. To represent the Department's case and to try to resolve
11 cases whenever possible, but otherwise to represent the
12 Department's position in administrative hearings before
13 administrative law judges.

14 Q. Are you familiar with the concept for an attorney to
01:16PM 15 vigorously, aggressively and ethically represent their clients?

16 A. Yes, I am.

17 Q. Now, does that hold true for you as an agency attorney?

18 A. Yes, it does.

19 Q. And do you have the same ethical obligation to represent your
01:16PM 20 client as, say, Mr. Rothenberg?

21 A. Yes, I do.

22 Q. I want to just -- once the case moves outside the
23 administrative proceeding, are there other parts the attorneys for
24 the DOH that have different roles?

01:17PM 25 A. Within the Division of Legal Affairs, there were a number of

1 different bureaus. I think there were six at the time.

2 Q. So, for example, who was Joe Biermann?

3 A. Joe Biermann was the Director of the Bureau of Litigation,
4 the bureau that liaisons with the Attorney General's Office on
01:17PM 5 specific litigation cases in court.

6 Q. And another name we heard mentioned was Hal Rosenthal?

7 A. He was an attorney who worked for Joe Biermann in the Bureau
8 of Litigation.

9 Q. And did you have any supervisory role outside of the
01:18PM 10 attorneys that were in the Administrative Unit?

11 A. No.

12 Q. Now, your function *vis-à-vis* the 25 or so attorneys that you
13 supervised, what would be your role with regards to those people?

14 A. I would assign them cases, and we had about 1,000 cases at
01:18PM 15 any one time. I would assign cases in various subject areas; I
16 would work with them to resolve those cases; if there were any
17 impediments, any difficulties, they would bring them to my
18 attention; we would try to meet with program staff if it was
19 regarding difficulties regarding evidence, regarding various
01:18PM 20 issues.

21 I would work with them if there were changes in the law
22 that affected the operations of the Bureau. I would ensure that
23 the Bureau attorneys knew about them, knew what to do.

24 I would evaluate the cycle time of the cases. We wanted
01:19PM 25 to resolve our cases expeditiously and avoid backlog, so we would

1 continuously try to meet-and-confer and move the cases along.

2 Q. I'm going to cut you off.

3 A. Okay.

4 Q. Okay?

01:19PM 5 A. Okay.

6 Q. Did you do actual legal work for these pieces of litigation?

7 A. Not litigation.

8 Q. For these administrative proceedings?

9 A. Yes.

01:19PM 10 Q. What type of legal work did you do?

11 A. I assigned myself cases from time to time. I worked for many
12 years handling cases and appearing before administrative law
13 judges in various kinds of cases.

14 Q. Now, there were some names mentioned and I just want to place
01:19PM 15 them. Who is Marie Shea?

16 A. Marie Shea was one of the attorneys in the Bureau of
17 Administrative Hearings. She was based physically in the Western
18 Region, Buffalo.

19 Q. How much experience did she have?

01:20PM 20 A. In 1999 she had only been with the Bureau for a few months.

21 Q. Do you know if she ever litigated a particular case before?

22 A. Prior to Beechwood I had assigned her a number of small cases
23 involving controlled substances and patient protection, individual
24 cases, and she had demonstrated her capabilities to my
01:20PM 25 satisfaction.

1 Q. Okay. And I think you mentioned Steve Steinhardt was not one
2 of your attorneys?

3 A. No, he was in the Bureau of House Counsel.

4 Q. How about John Darling?

01:20PM 5 A. John Darling was in the Bureau of Administrative Hearings.
6 He was based in Rochester, his specialty was Medicaid.

7 Q. And how about David Abel?

8 A. David Abel was an attorney in the Bureau of Administrative
9 Hearings with a wealth of experience.

01:20PM 10 Q. Okay. Now, did the attorneys go out and conduct the actual
11 investigations?

12 A. Never.

13 Q. What did they rely on?

01:21PM 14 A. The information from the surveys, witnesses, documents that
15 were shown to them.

16 Q. And with regards to Beechwood, did you ever conduct any
17 investigation?

18 A. None.

19 Q. Any of the information that you got -- strike that.

01:21PM 20 Where did you get your information?

21 A. From Marie Shea, and from the surveyors, and from the
22 Statements of Deficiencies that were shown to me.

23 Q. And did you rely on the information you got from those
24 people?

01:21PM 25 A. Yes.

1 Q. Now, just generally, in addition to the state procedure,
2 there's also a federal procedure?

3 A. Yes.

4 Q. And does your area of expertise have anything to do with the
01:21PM 5 federal side of things?

6 A. No, it does not.

7 Q. Your litigation was strictly state procedures?

8 A. Yes.

9 Q. Okay. Now, was there a time where federal actions or
01:21PM 10 termination actions have some impact on what you do on the state
11 side?

12 A. Yes.

13 Q. Could you just explain briefly about that?

14 A. Whenever a nursing home that had a Medicare/Medicaid provider
01:22PM 15 agreement was at risk for losing its provider agreement and being
16 faced with a possible termination, the Bureau of Administrative
17 Hearings always needed to consider and be prepared for the
18 possibility that some administrative action, state action, might
19 have to take place.

01:22PM 20 It's a little complicated, but I'll try to make it
21 simple --

22 MR. ROTHENBERG: Objection, non-responsive.

23 MR. LEVINE: I think you explained it.

24 THE COURT: I think he did.

01:22PM 25 BY MR. LEVINE:

1 Q. Now, before the spring of 1999, did you know anything about
2 Beechwood?

3 A. No, I did not.

4 Q. We heard that there was litigation that we referred to as the
01:22PM 5 *Langeveld* litigation?

6 A. Yes, in this trial.

7 Q. Okay. If an Article 78 was brought in the mid-1990s and it
8 involves the Department of Health, would the Bureau of
9 Administrative Hearings staff get involved with that?

01:23PM 10 A. No, it would not.

11 Q. Do you know which part of DLA would be involved with that?

12 A. That would be the Bureau of Litigation.

13 Q. And you were not involved with that?

14 A. No.

01:23PM 15 Q. Did you know anything about the *Langeveld* litigation?

16 A. I did not.

17 Q. Did you know anything about the change of -- let me ask it
18 this way -- strike that.

19 You heard there was some discussion about changing
01:23PM 20 regulations. Do you remember that testimony?

21 A. I heard that here.

22 Q. Were you involved at all with that?

23 A. Not at all.

24 Q. Did you know anything about Chambery's letters to the
01:23PM 25 Department of Health?

1 A. Nothing whatsoever.

2 Q. Did you know anything about Chambery's letters to HCFA?

3 A. I did not.

4 Q. Did you know anything about Mr. Chambery's complaints orally
01:24PM 5 to HCFA?

6 A. I did not.

7 Q. Would you agree before the spring of 1999 the names Beechwood
8 or Chambery meant little to you?

9 A. I would agree.

01:24PM 10 Q. We looked at -- I think it was Exhibit 118, your e-mail. Do
11 you recall that?

12 A. I do.

13 Q. That's the one of April 15th, 1999?

14 A. Yes.

01:24PM 15 Q. And I just want -- we can put it on the screen if you need to
16 look at it, but was there a question posed to you by that e-mail?

17 A. Yes, there was.

18 Q. Do you remember what the question was?

01:24PM 19 A. Yes, basically what information can be disclosed to HCFA
20 regarding a patient neglect case.

21 Q. Now, you use the words "patient neglect," correct?

22 A. Correct.

23 Q. Why is the words "patient neglect" important to your answer?

01:25PM 24 A. Because those are usually individual cases, cases against a
25 particular individual, like a nurse aide, somebody working in a

1 nursing home.

2 Q. So it wouldn't have to do with --

3 MR. ROTHENBERG: Objection to the leading. If we're
4 going to talk about --

01:25PM 5 THE COURT: Sustained.

6 MR. LEVINE: I didn't get a question out, though.

7 THE COURT: It sounded like it might be leading.

8 BY MR. LEVINE:

9 Q. Would a patient neglect case have any connection to an action
01:25PM 10 brought against a nursing home?

11 A. A state action?

12 Q. Yes, sir.

13 A. Not against the operator necessarily. Perhaps the facts
14 would be -- would connect to a violation or to a regulation that a
01:25PM 15 nursing home operator would be bound to comply with.

16 Q. Now, you gave a responsive e-mail dated a few days later. Do
17 you recall that?

18 A. To Arlene Gray?

19 Q. Yes, sir.

01:26PM 20 A. I don't believe I responded to Arlene Gray.

21 Q. Not to Arlene Gray, but you sent an e-mail out on April 21,
22 1999?

23 A. I sent that to Anna Colello.

24 Q. Okay.

01:26PM 25 A. Yes.

1 Q. You used in that e-mail a phrase "terminating the provider
2 agreement"?

3 A. Yes.

4 Q. And what's that phrase mean?

01:26PM 5 A. Terminating the provider agreement has to do with federal
6 action to terminate a federal Medicare provider agreement. Not my
7 area.

8 Q. And that e-mail -- I can put it back on the screen if you
9 need to -- that had nothing to do with -- it didn't use the word
01:26PM 10 revocation, did it?

11 MR. ROTHENBERG: Objection, leading.

12 THE COURT: Overruled.

13 THE WITNESS: Would you put it back up on the screen,
14 please?

01:27PM 15 BY MR. LEVINE:

16 Q. Yes, sir.

17 A. Are you waiting for my answer?

18 Q. Just look at it, then I want to know if you're mentioning the
19 word revocation in there?

01:27PM 20 A. No, I'm not.

21 Q. So the next e-mail chronologically, do you remember the
22 April 23rd e-mail you sent to various attorneys?

23 A. Yes, I do.

24 Q. And do you know what you were doing in that e-mail?

01:28PM 25 A. I was giving the prosecuting attorneys in the Bureau of

1 Administrative Hearings a heads-up that a case might be coming
2 down the pike; it looked like it probably wouldn't settle, we
3 might have to go to hearing, depending upon what the surveyors
4 found.

01:28PM 5 Q. Why would you possibly want to let your staff know about
6 that?

7 A. Because we have a very busy staff, we always need to plan.
8 If an attorney is -- has too many cases he or she is already
9 committed to, it would make it very difficult to assign the case
01:28PM 10 to that attorney.

11 So this was my way of saying this might be coming, are
12 you available? Are you able? It looks like it might not settle,
13 be prepared, I'll let you know what I find out.

14 Q. Now, you used the phrase "OCC may refer it for
01:29PM 15 revocation/fine/receivership." Do you see that?

16 A. Yes.

17 Q. OCC --

18 A. Well, I don't see it anymore, but I remember it.

19 Q. You remember it?

01:29PM 20 A. Yes.

21 Q. OCC meaning what?

22 A. The Office of Continuing Care, one of the programs of the
23 Department.

24 Q. And as of that date, does that indicate to you there was not
01:29PM 25 a referral?

1 A. No, there was no referral as of that date.

2 THE COURT: Are you getting into another document or
3 other area?

4 MR. LEVINE: I've got a little more on this, just a
01:29PM 5 couple more questions on this document, then --

6 THE COURT: All right.

7 MR. LEVINE: -- probably a good time to stop.

8 BY MR. LEVINE:

9 Q. You used the phrase "collision course." Do you recall that?

01:29PM 10 A. Yes.

11 Q. What's that mean and why is it important to explain to the
12 staff?

13 A. Well, when a nursing home is -- when serious violations have
14 been found in a nursing home and it's being reported to HCFA by
01:30PM 15 the surveyors, there is the possibility of a termination of that
16 provider agreement.

17 If that were to be the case, then the Department needs
18 to be prepared legally and throughout its staff to deal with
19 patients who need to be cared for. Otherwise, there would be
01:30PM 20 transfer trauma and chaos.

21 Q. Let me just keep us moving. Would there be anything to do
22 with the timing of procedures?

23 A. Yes. In order to safeguard the residents, one of the major
24 options is to petition the Court to appoint a caretaker, but the
01:30PM 25 only legal way that you can do that is to commence a revocation

1 action against the operating certificate. It's right in the
2 Public Health Law.

3 Q. Okay. You used the phrase to describe Mr. Chambery as
4 "threatening and obstructive." Do you recall that?

01:31PM 5 A. That's what I was told.

6 Q. And why is it important to advise staff of that?

7 A. Well, I think that it was tied into that this case might
8 not -- if we get a referral, it might not settle. So be prepared,
9 you know, whatever we need to do to go to hearing.

01:31PM 10 Q. And then at the end you write: It appears that, in general,
11 the facility tends to take in residents for short-term
12 rehabilitation and proceeds to ignore emergent problems or else
13 provides inappropriate treatment that results in harm while
14 failing to document. Do you recall that?

01:31PM 15 A. Yes.

16 MR. ROTHENBERG: May I have a reference from what are we
17 reading?

18 MR. LEVINE: It's all the same exhibit.

19 MR. ROTHENBERG: 118?

01:31PM 20 MR. LEVINE: No, it's his e-mail that you examined him
21 about.

22 MR. ROTHENBERG: Oh, 119? Sorry about that.

23 MR. LEVINE: No problem.

24 BY MR. LEVINE:

01:31PM 25 Q. Why is it important to go through that summary with your

1 staff?

2 A. I wanted them to be aware of what I had learned from whatever
3 source I had spoken with immediately prior to my writing them. I
4 was passing along the information.

01:32PM 5 Q. And this memo, in your opinion, is this an appropriate memo
6 or e-mail to be passing on to your subordinates?

7 A. Yes.

8 MR. LEVINE: Judge --

9 THE COURT: All right, let me see counsel for a second.
10 (WHEREUPON, the end of cross-examination).

11 * * *

12 CERTIFICATE OF REPORTER

13
14 I certify that the foregoing is a correct transcript to the
15 best of my ability of the record of proceedings in the
16 above-entitled matter.

17

18 S/ Christi A. Macri

19 Christi A. Macri, FAPR-RMR-CRR-CRI
20 Official Court Reporter

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